

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DANIEL KORZENIEWSKI,

Plaintiff,

v.

SAPA PHO VIETNAMESE RESTAURANT INC.,
d/b/a SAPAPHO.COM, and JOHN DOES 1-10,

Defendants.

MEMORANDUM & ORDER
17-CV-05721 (MKB) (SJB)

MARGO K. BRODIE, United States District Judge:

Plaintiff Daniel Korzeniewski commenced the above-captioned action on September 29, 2017 against Defendants Sapa Pho Vietnamese Restaurant Inc. (“Sapha Pho”), doing business as Sapapho.com, and John Does 1-10, alleging that Defendants violated the Copyright Act, 17 U.S.C. § 101 *et seq.*, and the Digital Millennium Copyright Act, 17 U.S.C §§ 1202(a) and (b) (“DMCA”), through the unauthorized use of a copyrighted photograph created by Plaintiff. (Compl., Docket Entry No. 1.) Defendants have failed to appear, answer, or otherwise respond to the Complaint. On March 1, 2018, Plaintiff moved for a default judgment and filed a motion for a permanent injunction based on the Copyright Act claim. (Mot. for Default J. & Permanent Injunction, Docket Entry No. 9.) Currently before the Court is a report and recommendation from Magistrate Judge Sanket J. Bulsara, recommending that the Court grant Plaintiff’s motion. (R&R, Docket Entry No. 14.)

I. Background

Plaintiff, a professional photographer and resident of Miami, Florida, is the copyright holder of the exclusive rights to a photograph image of a landscape depicting a rice paddy in

Sapa, Vietnam (the “Image”). (Compl. ¶¶ 8–9.) On October 19, 2014, Plaintiff registered the Image with the United States Copyright Office. (Certificate of Registration, annexed to Decl. of Rayminh L. Ngo, Docket Entry No. 11.) Plaintiff publishes the Image for sale on his professional website, www.dk.photoshelter.com. (Compl. ¶¶ 12, 15–16.) Defendant Sapa Pho is a restaurant located in Staten Island, New York, that owns and operates the website www.sapapho.com. (*Id.* ¶¶ 10–11.)

In or about June of 2016, Plaintiff discovered the Image on Sapa Pho’s website without any attribution. (*Id.* ¶ 17.) Plaintiff subsequently sent a cease and desist letter to Defendants on July 25, 2016, notifying Defendants that he held the copyright to the Image and that Defendants were infringing on that copyright. (*Id.* ¶¶ 17–18.) Plaintiff repeatedly contacted Defendants to have the Image removed from the website. (*Id.* ¶ 18.) Sapa Pho continued to display the Image on its website as of the date that Plaintiff filed his Complaint. (*Id.* ¶ 19.)

II. Procedural history

Plaintiff served Defendants with a summons and Complaint on October 6, 2017. (Aff. of Serv., Docket Entry No. 6.) To date, Defendants have failed to appear, answer or otherwise respond to the Complaint. Plaintiff requested a certificate of default on December 6, 2017, (Request for Certificate of Default, Docket Entry No. 7), which the Clerk of Court noticed on December 7, 2017, (Entry of Default, Docket Entry No. 8). On March 1, 2018, Plaintiff moved for default judgment and filed a motion for a permanent injunction based on the Copyright Act claim. (Mot. for Default J. & Permanent Injunction.) By Order dated April 5, 2018, the Court referred Plaintiff’s motion to Judge Bulsara for a report and recommendation. (Order dated Apr. 5, 2018.)

III. Report and recommendation

By report and recommendation dated January 3, 2019, Judge Bulsara recommended that the Court grant Plaintiff's motion for default judgment against Defendants in the amount of \$8,239.90, including \$7,500.00 in statutory damages and \$739.90 in costs. (R&R 16, 26.) Judge Bulsara also recommended that the Court deny without prejudice Plaintiff's request for attorneys' fees and give Plaintiff's attorney "one final opportunity to re-submit his application for attorneys' fees" within two weeks of the date of this Memorandum and Order. (*Id.* at 26.)

In addition, Judge Bulsara recommended that the Court grant Plaintiff's application for permanent injunctive relief and order Defendants to remove the Image from Sapha Pho's website and permanently refrain from using the Image or otherwise infringing upon Plaintiff's copyright to the Image. (*Id.* at 21.)

Judge Bulsara also recommended that the Court dismiss Plaintiff's DMCA claim without prejudice due to Plaintiff's failure to seek a default judgment on his DMCA claim. (*Id.*)

No party has objected to the R&R.

IV. Review of report and recommendation

A district court reviewing a magistrate judge's recommended ruling "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). "Failure to object to a magistrate judge's report and recommendation within the prescribed time limit 'may operate as a waiver of any further judicial review of the decision, as long as the parties receive clear notice of the consequences of their failure to object.'" *Sepe v. N.Y. State Ins. Fund*, 466 F. App'x 49, 50 (2d Cir. 2012) (quoting *United States v. Male Juvenile*, 121 F.3d 34, 38 (2d Cir. 1997)); see also *Almonte v. Suffolk Cty.*, 531 F. App'x 107, 109 (2d Cir. 2013) ("As a rule, a party's failure to object to any purported error or omission

in a magistrate judge's report waives further judicial review of the point." (quoting *Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003))); *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010) ("[A] party waives appellate review of a decision in a magistrate judge's [r]eport and [r]ecommendation if the party fails to file timely objections designating the particular issue." (citations omitted)).

The Court has reviewed the unopposed R&R and, finding no clear error, adopts the R&R in its entirety pursuant to 28 U.S.C. § 636(b)(1). Accordingly, the Court grants Plaintiff's motion for a default judgment and his application for injunctive relief based on his Copyright Act claim, and orders judgment in the amount of \$8,239.90. The Court dismisses without prejudice Plaintiff's DMCA claim. Plaintiff's attorney is directed to re-submit his application for attorneys' fees within fourteen days (14) of the date of this Memorandum and Order.

Dated: January 23, 2019
Brooklyn, New York

SO ORDERED:

s/ MKB
MARGO K. BRODIE
United States District Judge